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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 910

A. J. SIMLER,
Petitioner,

VERSUS

LESLIE L. CONNER and PHILLIPS PETROLEUM COMPANY, a corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN B. OGDEN
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Oklahoma City, Oklahoma
Attorney for Petitioner

December, 1965

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8780

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LESLIE L. CONNER and PHILLIPS PETROLEUM COMPANY, a corporation,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Comes now the above named Petitioner and petitions this Court to grant a Writ of Certiorari and review the opinion of the United States Court of Appeals for the Tenth Circuit, dated October 11, 1965. A copy of the opinion is set forth in full in the Appendix hereof and marked "A".

Jurisdiction of this Court is envoked under 28 U.S.C. 1254, paragraph No. 1.

A petition for rehearing was filed in the United States Court of Appeals Tenth Circuit and denied on November 24, 1965.

STATEMENT OF FACTS

This is a suit between A. J. Simler, formerly a client of Leslie L. Conner, seeking a declaratory judgment for the purpose of determining what is a reasonable attorney's fee. The petitioner paid the respondent, Leslie L. Conner, $74,000.00 in cash. This controversy has heretofore been before this Court. See *Simler* v. *Conner,* 83 S.Ct. 609, 372 U.S. 221, 9 L.Ed.2d 691.

I

The binding effect of a pre-trial agreement upon the Trial Judge presents the question of due process of law.

After this Court granted the petitioner a jury trial and when the case came on for pre-trial before Judge Bohanon, a discussion was had and a jury was waived under the pre-trial agreement that a reasonable fee would be fixed in money and there would be no interest or percentage in the property but would be a reasonable cash fee. We, therefore, ask the Court to read the Appendix "B" which sets forth the conditions under which a jury was waived and under which condition and agreement the case was to be tried.

The case involved, a will contest which was lost in the Supreme Court of Oklahoma, but the Circuit Court of Appeals, 210 F.2d 99, held that Mr. Simler being the only heir at law of Birdine Fletcher, deceased, would take the farm lands by reason of the disqualification of a corporate beneficiary being unable to take.

The question now presented to this Court is the binding effect of a pre-trial agreement and we cite the following:

Moore's Federal Practice, Second Edition, pages 1126 and 1127, Notes 4, 5, and 6.

The letter referred to in the pre-trial agreement and upon which it was agreed the case would be tried is, as follows:

"July 18, 1952.

"Mr. Leslie L. Conner, Atty., 410-414 Hightower Bldg., Oklahoma City, Oklahoma.

"Dear Sir: Re: Birdine Fletcher Estate County Court, Oklahoma County, Okla.

"This confirms our employment of yourself and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

"We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the neighborhood of approximately $1,000.00.

"We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary, in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which

fee may be set by the County Court or any other court if the matter is successful either by trial or judgment or compromise.

"If the matter is not won, compromised or settled, you are not to charge us a fee.

"Yours truly,

"/s/ A. J. Simler

"A. J. Simler, for himself and his children."

Fact that pre-trial order was not formally signed does not prevent it from being valid. *Robertson* v. *Malone,* 190 F.2d 756; *Sinclair Refining Company* v. *Howell,* 222 F.2d 637; *Frank* v. *International Canadian Corp.,* 308 F.2d 520, holding substantially that pre-trial order is binding in absence of request for amendment or modification at time of trial.

A jury was waived relying upon the pre-trial agreement. The Trial Judge rendered a judgment for the sum of $290,975.59.

The Trial Judge's opinion is found in 228 F.Supp., page 127.

In order for this Court to determine under what conditions a jury was waived, and what was the pre-trial agreement, we have copied from the record in the Court of Appeals, and the same is shown in Appendix "B" hereof.

Order based on pre-trial conference, crystallizing issues of law and fact is binding upon the court. *Montgomery Ward & Co.* v. *Northern Pac. Terminal Co.,* 128 F.Supp. 520.

Where pre-trial order never became sufficiently definitive for a trial, judgment would be vacated and case remanded with instructions to set aside findings, conclusions and pre-trial order. *Plastino* v. *Mills*, 236 F.2d 32.

We, therefore, feel that the judgment was unauthorized and that it violates the pre-trial agreement, and deprives the petitioner of due process of law.

II

The disregarding of State law in fixing of attorney's fees constituted denial of due process of law.

Title 5, Section 7, Oklahoma Statutes Annotated, limits the amount of recovery as attorney's fees to fifty (50%) per cent. The statute is, as follows:

> "It shall be lawful for an attorney to contract for a percentage or portion of the proceeds of a client's cause of action or claim not to exceed fifty per centum of the net amount of such judgment as may be recovered, or such compromise as may be made, whether the same arises excontractu or ex delicto, and no compromise or settlement entered into by a client without such attorney's consent shall affect or abrogate the lien provided for in this chapter. 1 R.L. 1910, § 248."

The reasonable market value of the property involved and the highest market value as fixed by Mr. Edinger, a witness for the respondent, was $250,000.00. We are attaching hereto in the Appendix excerpts from the testimony of Mr. Edinger. The property was appraised in the State Court Probate Proceedings at $150,000.00 and then appraised by the Federal Government for Estate Tax pur-

pose at $176,000.00. The highest value placed on the property during the trial was by the witness, Mr. Edinger, which testimony is set forth in the Appendix "C".

It will, therefore, be seen that the judgment rendered exceeded what the property could be sold for today and violated the statute of Oklahoma in the fixing of lawyer fees in excess of fifty (50%) per cent of the recovery.

III

Basing the judgment on speculation, conjecture, and uncertainty as denying due process of law to the petitioner.

In order for the Court to fully understand the grave injustice of basing the judgment on speculation, conjecture, and uncertainty as to the value of the property involved, a very material element in determining the attorney's fees, we have attached hereto, as Appendix "D", excerpts from the testimony of the witness Edinger and upon which the judgment in this case was based.

After looking at this testimony, the Court can readily see that this petitioner has been required to pay an attorney's fee basing value of property recovered upon speculation, conjecture and uncertainty, which is a violation of established law and certainly wholly unjust. While Mr. Edinger gave the court a figure as to value of $779,480.00, he admitted that this figure was not an equal value, being a speculative value, and admitted further that it would be necessary to deduct from $779,480.00 which would be under his testimony a value of $296,480.00 and the Court will note that this witness said this sum would be the

present worth, what we call the present worth of the property.

He further testified that in his opinion, the property was worth $250,000.00. The judgment in this case exceeds the value of the property by $40,973.59.

We call the Court's attention to the following cases which, we think hold beyond a question of a doubt, that a judgment to be a judgment must be definite as to amount and cannot be left without knowing how much money a person is to receive under a judgment. We start with C.J.S., Vol. 49, page 159, Article 76, which is in part as follows:

> "A judgment for money must specify with definiteness and certainty the amount for which it is rendered, and should be so worded as to avoid the possibility of a double recovery, there can be no judgment payable by installments. It has been said that a judgment includes all amounts for which execution may properly issue. A judgment for an amount left blank, or otherwise wholly uncertain, is at least erroneous, and according to a number of decisions such a judgment is void; but according to another authority failure sufficiently to designate the amount renders the judgment merely irregular and erroneous, and not void * * *.
>
> "In Dray v. Crich, 3 Or. 298, this court said: 'It is of the gravest importance that, when a final judgment is rendered, the record shall be definite and certain, and show unequivocally what matters have been adjudicated, and that the decision shall be a finality in regard to the matters in issue.'

"This precept is cited with approval in Schmid v. City of Portland, 83 Or. 583, 591, 163 P. 1159. See, also, Dickerson v. Walker, 1 Ala. 48, Alexander v. Leland, 1 Idaho 425, and Boyken v. State, 3 Yerg. (Tenn.) 426. In 33 C.J. 1196, Para. 129, it is stated: 'IT IS A GENERAL RULE THAT JUDGMENT MUST NOT BE CONDITIONED UPON ANY CONTINGENCY, AND IT HAS BEEN HELD THAT AN ALTERNATIVE OR CONDITIONAL JUDGMENT IS WHOLLY VOID.' In support of this statement, are cited the cases of Puette v. Mull, 175 N.C. 535, 95 S.E. 881; Strickland v. Cox, 102 N.C. 411, 9 S.E. 414; and Dunn v. Barnes, 73 N.C. 273." (Emphasis ours.)

CONCLUSION

WHEREFORE, the petitioner most respectfully asks this Court to grant a Writ of Certiorari herein; and order a new trial or such other relief as may appear proper herein.

Respectfully submitted,

JOHN B. OGDEN
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Oklahoma City, Oklahoma
Attorney for Petitioner

December, 1965

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1965

A. J. SIMLER,

Appellant,

v.) Number 7822

LESLIE L. CONNER and PHILLIPS PETROLEUM COMPANY, a corporation,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

John B. Ogden for Appellant:

Phil E. Daugherty and Paul C. Duncan (Leslie L. Conner, James M. Little, Irvine E. Ungerman and Leslie L. Conner, Jr., on the brief) for Appellees.

Before PHILLIPS, BREITENSTEIN and HILL, United States Circuit Judges.

HILL, Circuit Judge.

This declaratory judgment action was brought below by appellant, Simler, against appellee, Conner, asking the court to fix and determine attorney fees, due Conner from Simler, under a contract between the parties. The trial court, after a jury had been waived, made such determination and Simler has appealed. The litigants are not

strangers to this court, as this case is only a part of the final chapter in a long story of litigation in the State Courts of Oklahoma and the Federal Courts. To put the present controversy in proper perspective, a brief history of the litigation must be recounted.[1]

Birdine Fletcher, a sister of Simler, died testate in Oklahoma in 1952. By the terms of her will, Simler, who otherwise would have inherited the entire estate as her only heir at law, received "$1.00, this amount and no more." All of her property, which was very substantial, was left to strangers. Simler employed Conner in July, 1952, as an attorney to contest the will. This employment is evidenced by two letters, one dated July 18[2] and the other September

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[1] See the trial court's findings of fact in Simler v. Conner, 228 F. Supp. 127, for detailed history of the litigation.

[2] "July 18, 1952.

"Mr. Leslie L. Conner, Atty., 410-414 Hightower Bldg., Oklahoma City, Oklahoma.

"Dear Sir: Re: Birdine Fletcher Estate, County Court, Oklahoma County, Oklahoma,

"This confirms our employment of yourself and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

"We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

"We also agree to pay you and your firm a reasonable attorney fee for the services rendered and to be rendered in this case and in the County Court and if necessary, in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court if the matter is successful either by trial or judgment or compromise.

"If the matter is not won, compromised or settled, you are not to charge us a fee.

"Yours truly,
"/s/ A. J. Simler
"A. J. Simler, for himself and his children."

25,[3] in 1952. The validity of the will was thereafter unsuccessfully contested in the County Court of Oklahoma County, the District Court of that County and the Supreme Court of Oklahoma.[4] In October, 1952, while the attack upon the competency of the testratrix, as it affected the validity of the will, was being litigated in the state courts, Conner conceived the legal theory that the foreign corporations named as devisees and legatees in the will could not take title to the property in the estate because of a provision in the Constitution of the State of Oklahoma. He then filed a diversity suit in the United States District Court for the Western District of Oklahoma on behalf of Simler against the executor of his sister's will and the foreign corporations on this theory. After adverse judgments in that court, Conner and his associates appealed the case to this court, obtained a reversal of the district court

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[3] "Mr. Leslie L. Conner, Conner, Hilpirt & Britton, Attorneys and Counsellor at Law, 410-414 Hightower Building, Oklahoma City, Oklahoma.

"Dear Sir: With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

"25% of the amount recovered if settled without trial.

"33% of the amount recovered if case is tried in County and District Court.

"50% of the amount recovered if the case is appealed to the Supreme Court.

"I understand that all expenses, taxes and costs are to be deducted first.

"This is a contingent fee and if nothing is recovered, no fee is paid.

"If anything is recovered or settled, I agree to pay you the above fees.

"Yours truly,
"A. J. Simler"

[4] Simler v. Wilson, et al., 269 P.2d 349.

thereby procuring the entire estate for Simler, as the sole heir at law of the decedent.[5] A petition for certiorari was eventually denied by the Supreme Court and soon thereafter distribution of the entire estate to Simler began.

By the very nature of the action Simler acknowledges that Conner and his associates in the litigation are entitled to an attorney fee. The only question presented here is whether the attorney fee fixed and determined by the court below is a reasonable one. At the outset of our determination we are confronted with the uniformly accepted doctrine that a judgment of a trial court will not be disturbed upon appeal unless it can be concluded that the material findings of fact are clearly erroneous or that the trial court has erroneously applied the law.[6]

The trial court determined that a reasonable contingent attorney's fee for all of the legal services rendered by Conner and his associates to Simler to be 50 per cent of the June, 1957, Value of the property recovered. And further that the 50 per cent should be reduced to 36 per cent because of a settlement made between Simler and one of the associates, whose share of the total fee was to be 14 per cent.

In determining a reasonable attorney fee some of the factors to be given consideration are: (1) Is the fee to be a contingent one; (2) how much is involved in value in the matter; (3) what benefit has accrued to the client; (4) what degree of professional skill and experience was displayed by the attorney; and (5) what amount of time and expenses were spent by the attorney on the matter.[7] Also,

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[5] Simler v. Wilson, 10 Cir., 210 F.2d 99, cert. denied 347 U.S. 954, rehearing denied 347 U.S. 973.

[6] Walker v. Wiar, 10 Cir., 276 F.2d 39; Rule 52, F. R. Civ. P.

[7] Wyoming Ry. Co. v. Herrington, 10 Cir., 163 F.2d 1004; Miller, et al. v. Burkett, 191 Okl. 521, 130 P.2d 996; Driver v. Tolstornog, — Okl. —, 358 P.2d 1108; 7 C.J.S. § 191, p. 1080.

the allowance of attorney fees is generally a matter within the sound judicial discretion of the judge and an appellate court is not warranted in overturning the trial court's judgment unless under all of the facts and circumstances it is clearly wrong.[8]

Expert testimony was adduced at the trial and from such testimony on behalf of Conner we have no hesitancy in holding that there is ample evidence in the record to support the court's allowance of a 50 per cent total fee as a reasonable one. Two experienced, qualified and outstanding members of the Oklahoma Bar, Mr. Paul Brown and Mr. Gus Rinehart, testified as experts for Conner. Both witnesses possessed a knowledge of the nature and extent of the litigation involved and unequivocally fixed a reasonable fee at 50 per cent of the value of the property recovered. Even one of the appellant's expert witnesses fixed a reasonable fee in the case at 50 per cent and appellant's other expert acknowledged the fine quality of the legal services rendered. In addition, one of the exhibits, which is set out in full at foot-note 3, a letter from Simler to Conner written at the inception of the litigation, shows an agreement by Simler to pay a 50 per cent fee based on the amount recovered. The parties agreed that this letter would not be relied upon by Conner as determinative of the fee to be allowed but it was admitted into evidence and shows that Simler was agreeable to a 50 per cent fee at that time and that he apparently did not consider such a fee execessive. It should also be noted that the balance due Conner is not to be paid in cash immediately but will be paid from 36 per cent of the oil payments accruing monthly from the farm. From the trial court's opinion it is evident that, in addition to the exceptional factual situation presented, he gave consideration to all of the factors set forth above and

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[8] United States v. Anglin & Stevenson, 10 Cir., 145 F.2d 622, cert. denied 324 U.S. 844.

to the Canons of Professional Ethics adopted in Oklahoma, Title 5, Chapter I, Appendix 3, Oklahoma Statutes, 1961. Oklahoma, by statute, expressly authorizes 50 per cent contingent attorney fees. Title 5, § 7, O.S.A. Cases approving 50 per cent contingent fees are too numerous to be set forth here, but all of the cases on the reasonableness of attorney fees teach that the particular facts of each case must determine what a reasonable fee will be. It should also be pointed out that appellant, after receiving the fruits of appellee's skilled legal efforts, did not choose to fully compensate appellee but brought this action instead. That has been eight years ago and appellee has been deprived of the use of his well earned fee, or of interest upon the money he was entitled to, for that period of time. Clearly, the evidence in this case supports the findings of the trial court.

The trial court, after determining that 50 per cent of the value of the property obtained was a reasonable attorney's fee, then proceeded, under the evidence, to fix a value of the property as of June 1, 1957, the date of the completion of Conner's services. The property obtained for Simler through this long series of lawsuits consisted of a quarter section of land, subject to an oil and gas lease, with sixteen producing oil and gas wells thereupon and accumulated oil and gas runs therefrom. The trial court put a value of $12,000 upon the surface rights of the quarter section and a value of $779,480 upon the proved primary and secondary oil and gas reserves and undeveloped oil and gas reserves above a 6400 foot level below the surface. Apparently, no question is raised as to the value of the surface rights to the farm but appellant attacks the oil and gas valuation and says that the trial court used speculative and unreasonable figures in arriving at this valuation figure. We have carefully read all of the expert testimony adduced at the trial and do not agree with appellant. Again it is our view that this finding of the trial judge is amply and sufficiently supported by the evidence.

In regard to this valuation, the evidence shows that this 160 acres is part of a unit consisting of 3700 acres with 5.37 per cent assigned to it as its share of production from the entire unit. Even though the wells on the Simler land go dry the owner will be entitled to share in production from the entire unit. Simler has either received or has become entitled to receive more than $382,000 from oil and gas runs from this farm since acquiring the title to it and the undisputed evidence further shows that the property, since 1952, has produced income in excess of $475,000.

Appellee's two expert witnesses placed June, 1957, values on the oil and gas reserves at $779,433 and $627,893, without giving any particular value to the unexplored horizons under the land. The evidence also showed that the right to explore unexplored horizons below 6400 feet has considerable value.

Appellant puts stress upon the pre-trial proceedings and order to support his contention that the judgment, as rendered, violates what the parties had agreed upon.[9] We find no merit to this contention. It is true that the parties agreed that Conner would not be given an interest in the property in payment of any fee due him. The judgment is in keeping with this agreement but it does properly give Conner a lien upon 36 per cent of Simler's interest in the minerals and mineral rights above 6400 feet until the full amount due Conner is paid.[10] By the judgment, Conner is

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[9] The findings of fact show the following:

"* * * At pre-trial conference it was stipulated by the parties and their attorneys that defendant would not rely on the contract of September 25, 1952, but that the contingent attorney's fee should be fixed by the Court, without a jury, to be paid in money only, and that Conner and his associates relinquished their rights to any interest in the real estate above described and the oil and gas production therefrom, except as hereinafter stated."

[10] Title 5, § 6, O.S.A., expressly provides for an attorney's lien for services in Oklahoma.

expressly precluded from any interest in the mineral rights below the 6400 feet horizons, except that his lien would apply to production from these horizons if such be had. We do not believe that this lien provision violates the pre-trial agreement or order, because it gives Conner no ownership in the land or mineral rights. The lien is consistent with the colloquy had between courts and counsel at the pre-trial conference.[11]

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[11] At the pretrial conference on December 17, 1963, the following discussion was had:

"The Court: Well, I want you to understand and I want him to understand that if you do that, that the Court, in fixing a cash fee for these lawyers, will have some determination of reserves to determine the amount of probable production dollar-wise from that property.

"Mr. Ogden: Yes, sir.

"The Court: And go from there to determine the amount of cash they are to receive, and fix the lien upon that payment.

"Mr. Ogden: Yes, I know he—I know to protect their fee, whatever judgment.

"The Court: To protect their fee down through the time until it's paid, and when it's paid, why, he's got his farm free of any payment, and then you should figure that that payment should be based on a certain percentage of the earnings, because he's going to want some of it, probably himself. What do you say about this, Mr. Duncan."

Then at a pretrial conference on December 27, 1963, there is another mention of a lien:

"Mr. Ogden: Your Honor, on that case I'd like to be positive—I think I am, but that I understand this. Now since I talked to your Honor the other day in the courtroom when we had the pre-trial, I've gone to Little Rock, North Little Rock and talked to Mr. Simler, and I told him and I think this is correct that if we waived a jury in this case, the Court would not consider the second letter, or any interest in his property, but only fix a reasonable lawyer fee in money. Is that the understanding you people have?

"Mr. Little: Yes, sir, that was agreeable with us if they waived a jury and that you could set a cash fee to be paid out of what's accumulated and then if it was more than what's accumulated to be paid as it accrued from the farm, and that we would not claim any interest as such in the minerals or the surface of the farm.

"Mr. Ogden: We understand—

"Mr. Little: We'd like it to be secured on the payment of any fee."

Appellant complains about the trial court's use of the date, June, 1957, in fixing the value of the property acquired. We agree with the trial court. The date used was the actual time when appellant came into possession of the property by distribution from the estate. He further urges that the judgment is indefinite and with that argument we do not agree. We will not set out the judgment here or unduly lengthen this opinion by attempting to summarize it because it is fully set out in the trial court's published opinion, Simler v. Conner, supra. We have carefully read it and conclude that it is definite, clear and unambiguous.

We have very carefully considered the entire record before us and agree fully with the trial court's disposition of this long pending litigation. The allowance is not unconscionable and is clearly within the bounds of the evidence that was before the trial judge. He certainly did not abuse his discretion in the matter.

AFFIRMED.

APPENDIX "B"

"* * * Mr. Duncan: May I say something to the Court now?

The Court: Yes.

Mr. Duncan: When Mr. Ogden made his last statement to the Court he stated that the contractual relationship that should prevail in this matter would be the contract which was made on July the 18th, 1952, which was the first letter from Mr. Simler to Mr. Conner.

The Court: Yes.

Mr. Duncan: Now if he takes that position in all seriousness before this Court, then on behalf of my client I make this statement for the record. That letter provided that the attorney fee should be fixed by a Court, any Court, and if he is relying upon that letter, we will be glad to rely upon it ourselves, and ask that this Court fix a reasonable attorney's fee in this matter and bring it to an end, because that's what the letter of July the 18th provides; and we ought to get this litigation behind us. If he wants to rely on it, we want to rely on it and let the Court decide the fee.

This matter has been pending far too long. Mr. Simler is an old man, and will not have any of the fruits of the balance of this money, although he's had over $100,000.00; he ought to have the rest of what he is entitled to during his lifetime. Mr. Conner and Mr. Daugherty should have their fees and not be required to wait an interminable period of time to get that which has been earned.

So if he wants to do that, we are willing to submit this case to the Court on the letter of July the 18th, 1952.

The Court: And what do you say about that, Mr. Ogden?

Mr. Ogden: And disregard all other letters?

Mr. Duncan: Try the lawsuit only on a reasonable fee before this Court.

Mr. Ogden: Well, now, let me be positive I understand it, because if Mr. Simler is able I'll just go over to Little Rock and see him. You might have fixed up a deal right there that we'd agree to. If I understand it, so I'll be positive about it, I don't want to be technical, but you are willing to try this case and leave it up to the Court to determine how much a reasonable fee is in money under this letter of July the 18th, 1952?

Mr. Duncan: Well, I don't think we have a misunderstanding, because I think Mr. Ogden means what my client means, but they want to be sure that it's the total recovery which was obtained by their actions, including money, land and everything. They will take their fee in money but they want everything considered by the Court that was accomplished. Isn't that what you mean?

Mr. Ogden: That's what I meant. That's just what I was trying to find out. Just pay you a reasonable fee. The only thing that I would know that you could pay something with would be money.

Mr. Duncan: Whatever the Court fixes the fee and however it's to be given to them would make no difference if it would be decided land or money, but the entire recovery is what they are concerned with.

The Court: The Court is very concerned about the stipulation that you gentlemen will enter into to waive a jury and try it to the Court. The fee contemplated

of July 18, 1952, of a reasonable fee of all that's recovered, that would be, of course, the farm, the surface, the minerals and what have you? Now then if Mr. Ogden is talking about money alone, in order for the Court to give a reasonable fee, based upon the value of the recovery, whether it be land or minerals or reserve minerals or reserve oil, I'd have to have some kind of a report showing how much the reserves are.

Mr. Ogden: Sure.

The Court: Because the cash fee would be based upon the reserves the same as cash that is produced.

Mr. Ogden: Sure.

The Court: Be in dollars, but I think you gentlemen are making some steps. I can decide the case and I think I can decide it fairly.

Mr. Ogden: I think you could, if Your Honor please. What I wanted to know and what I wanted to be positive about, see the letter of the 25th says percentagewise, the letter that, see, certain amount of, you've heard my position on it; but, nevertheless, the first letter of the 18th said a reasonable fee.

The Court: Yes.

Mr. Ogden: Now, what I would contemplate if somebody said he would pay me a reasonable fee, that they would pay me in money and that's what I thought that, then I wouldn't want to try the case out on the theory that they were going to take a portion of the land for the lawyer fee, if the Court found they were entitled to a lawyer fee. I would just go upon the theory that if the Court would fix, and that's what I wanted to be positive about before I talk to Mr. Simler if I'm able to talk to him, I don't know that I can

now, but I want to talk to him because I want to know positive I know.

The Court: I want to ask you this: I understand what you're talking about—what is the difference in a reasonable fee in money and minerals and money or land and minerals or money based upon money, land and minerals?

Mr. Ogden: Well, if the Court please, so you might better understand why I am making even these statements, my client don't want to give up a inch of his land to anybody, or minerals. He wants that.

The Court: Well, in my thirty-five years of practicing where I had title questions and took it on a contingent fee, I got part of that minerals, I got part of the surface and I got part of that farmhouse and the barn and the wells and everything else. Now then, if you're going to take him out of that, you've got to determine the amount of reserves.

Mr. Ogden: Yes, sir.

The Court: And take the cash based upon the reserves, and I think it's all six one way and a half dozen the other. You can put it on reserves or you can put it on so much of an oil payment, pay it out some other way, that in the end the adjustment is fair, equal and just.

Mr. Ogden: He said, 'I agree.' That says, 'I agree to pay you a reasonable fee.' Now if you find that in a contract with a client and a lawyer, that means in money. You don't have to put down there 'in money,' because it says, 'I'll pay you a reasonable fee.' You could pay him in chickens or cattle or horses. You'd have to pay him in money or land, is my construction of it; and that's what I want to be able to tell Mr. Simler when I talk to him, that if the Court found

that he owed additional fees, the Court would fix a certain amount of money and order it paid, give judgment for that.

The Court: Well, I understand that. If the Court is given latitude in your stipulation, that a reasonable fee would be based upon the value of the farm, the land and the reserve minerals, that's all right, but I wouldn't want to be put in a box.

Mr. Ogden: No.

The Court: Of doing what you might think would be unfair, if I'd be relegated to the amount that's accumulated in the hands of Phillips now, and in the hands of the clerk, to fix the fee.

Mr. Ogden: Well, if the Court please, I'd just say this to the Court, that of course—I am not sure—that when you fix a lawyer fee in anything, you take the amount involved, and the likelihood of winning or not winning, whether it's a contingent or fixed fee, and the value of whatever benefits you do for your client, whatever you get for him, you know that would help him.

The Court: The skillfulness in which the matter was handled and the success.

Mr. Ogden: The success, that's correct. Our Bar Association has laid down recently some rules in the Bar Journal along that line which, of course, have always been the rules, but anyway it just refreshed my mind and that's the way I remembered it.

But my client, as I have heretofore stated, is eighty-five years old or eighty-six, I can't remember which, the last August the 8th and is in the hospital. I have to go talk to him. I can't just call him up over the phone or write him a letter and make him understand it; but if I understand it correctly that, you see,

we then just wipe out everything after the letter of July the 25th, and say that there will be nothing offered in evidence as to that as far as documents are concerned, except we will offer in evidence what you people did, and the values, what kind of work and so forth.

The Court: You're talking about trying it to a jury?

Mr. Ogden: No, I mean if we tried it to the Court.

The Court: But I already know about all these things.

Mr. Ogden: I know, but insofar as we wouldn't offer them in evidence they wouldn't be pertinent. We are just trying it on the letter of July the 18th, reasonable fee, and to be fixed in money. Now if I could go tell him that, I think, if Your Honor please—of course, I'm not authorized to waive the jury for him without talking to him, but I believe he'd waive a jury.

The Court: Well, I want you to understand and I want him to understand that if you do that, that the Court, in fixing a cash fee for these lawyers, will have some determination of reserves to determine the amount of probable production dollarwise from that property.

Mr. Ogden: Yes, sir.

The Court: And go from there to determine the amount of cash they are to receive, and fix the lien upon that payment.

Mr. Ogden: Yes, I know he—I know to protect their fee, whatever judgment.

The Court: To protect their fee down through the time until it's paid, and when it's paid, why, he's got

his farm free of any payment, and then you should figure that that payment should be based on a certain percentage of the earnings, because he's going to want some of it, probably, himself. What do you say about this, Mr. Duncan?

Mr. Duncan: We are in accord with that. I think it would be easy enough to determine the reserves and make a stipulation. If not, you can hear evidence as to what the reserves are and the value of the property. My clients are perfectly willing to have the fee in a money judgment, or if he wants all of the real estate, as long as it's considered and its value and the reserves are all considered in the Court's determination of the fee.

The Court: Well, if we can settle this matter in a way that's agreeable to the parties, Mr. Simler and Mr. Conner and those interested by settlement, it's far better to end this contract that way, I think, than to hammer and tongs it out before a jury and all of that work and trouble, but I am willing to go either way. I can sit here for a week putting on evidence and hearing it and I won't wear out, and I'll be with you as long as you want to try it, anyway you want to try it, but I do think that it's time that this lawsuit is put at rest.

All right, then what do we want to do? If that's agreeable and you understand each other here in open court, here it's the 17th.

Mr. Duncan: How much time would you need to confer with your—

Mr. Ogden: Well, if Your Honor please, would it be asking too much of you and opposing counsel to pass this over to a further pre-trial on some specified date that suits Your Honor, and then if Mr. Simler—

of course, he could get worse and might even pass away, you can't tell, but if he is able to talk, why if it's necessary I'll just drive over to Little Rock and go to his house and talk to him and explain the matter to him and tell him that whatever judgment the Court thinks is right, the Court will fix it, and that it will be in money, but that it will be also a lien upon his property, so I'll just explain that to him, so that's all there would be to it.

Mr. Duncan: How much time do you want?

Mr. Ogden: Well, I was just going to say that this is the 17th day, and of course the rest of this week is just about three days. I know I couldn't do it then because I don't imagine I could talk to him. He's still in the hospital. So then next week is Christmas week, and if you could give me until about the 10th of January, somewhere in there, I think, you know I'd just have to run in when I can, when he's able to be seen and when I'm able to get away.

The Court: I was going to suggest the 27th of December.

Mr. Duncan: That's right, because the Court is contemplating a jury docket, are you not?

The Court: Yes, that's right. * * *"

December 27, 1963

"The Court: The first case on the pre-trial docket is 8008-Civil, A. J. Simler vs. Leslie L. Conner, et al. Are the parties ready to proceed with the pre-trial in that case?

Mr. Little: We are ready, Your Honor.

Mr. Ogden: Yes sir.

The Court: Very well.

Mr. Ogden: Your Honor, on that case I'd like to be positive—I think I am, but that I understand this. Now since I talked to Your Honor the other day in the courtroom when we had the pre-trial, I've gone to Little Rock, North Little Rock and talked to Mr. Simler, and I told him and I think this is correct that if we waived a jury in this case, the Court would not consider the second letter, or any interest in his property, but only fix a reasonable lawyer fee in money. Is that the understanding you people have?

Mr. Little: Yes, sir, that was agreeable with us if they waived a jury and that you could set a cash fee to be paid out of what's accumulated and then if it was more than what's accumulated to be paid as it accrued from the farm, and that we would not claim any interest as such in the minerals or the surface of the farm.

Mr. Ogden: We understand—

Mr. Little: We'd like it to be secured on the payment of any fee.

The Court: Well, the way to do that is to prepare a pre-trial order and set out; you gentlemen agree to it and the Court will abide by any agreement you make, of ocurse.

Mr. Ogden: Now then, if Your Honor please, I talked to Mr. Simler about that and he asked me to have one other provision incorporated in it, and that was the fact that we are waiving a jury before Your Honor, but if the case should for any reason be transferred—I believe this is either three or four times—before some other judge, he might not feel that he would want to waive a jury, but I understand it's going to be tried to Your Honor.

The Court: If I live, I will try it.

Mr. Ogden: All right, sir. Anyway that's what he asked me. Now, if the Court please, under those conditions, we now waive a jury.

The Court: All right.

Mr. Ogden: Now that's out of the way.

The Court: Let the record show that plaintiff waives a jury and we will try the case on its merits to the Court.

Mr. Ogden: Yes, sir.

The Court: With the understanding that the Court is to make such award as the Court may find proper under all the circumstances, for attorney's fees in dollars.

Mr. Ogden: That's correct.

The Court: Provided that it be paid out of what's accumulated, or a portion out of what's accumulated, and a portion out the earnings, put in the stipulation how you want the Court to handle it. My duty is to fix the figure, and it will be your duty to fix how that figure is to be paid, I assume, or I can do it.

Mr. Ogden: If the Court please, we would much prefer just to leave the matter in your hands. You can fix the lien on the property or anything that you felt like would be proper. In other words, I don't think there will be any question about the Court being able to fix the lien, enforce the judgment, couldn't be any question about that, so they'll get their money, whatever the Court allows them. * * *"

APPENDIX "C"

A. "* * * Now the $779,480 that I computed as being the value of the sale of the oil and gas from these properties would have to be discounted at 5%, which would amount to approximately $483,000, discounted.

Q. Have to knock $483,000 off of that?

A. No, sir, that would be the discounted or present worth, what we call a present worth of the property.

Q. All right, sir. That would be present worth, but how much could you sell it for on the market?

A. SOME FRACTION OF THAT, AND THEN WE GET INTO THINGS THAT ARE PRETTY NEBULOUS AND I CAN ONLY ANSWER THAT IN GENERAL TERMS.

GOOD PRODUCING PROPERTIES THAT HAVE AN ESTABLISHED DECLINE, AND THERE IS LITTLE OR NO SPECULATIVE VALUE, SPECULATION INVOLVED IN IT, COULD—IT'S FREQUENTLY SOLD FOR TWO-THIRDS OF THE PRESENT WORTH, WHICH IN MY OPINION IN THIS PARTICULAR CASE WOULD BE IN THE ORDER OF $324,000.

Q. SO IT WOULD GO DOWN IF YOU WERE GOING TO SELL IT FROM THE $700,000-AND SOME YOU MENTIONED TO $324,000, IS THAT RIGHT, SIR?

A. YES.

Q. WOULD YOU PUT YOUR ANSWER SO THE REPORTER CAN PUT IT IN THE RECORD?

A. YES SIR, THAT IS CORRECT.

Q. (By Mr. Ogden) I didn't ask you one question, and I would like to ask it. How much will you give for that lease right now, in the shape it's in, as an oil man?

A. How much would I pay for the lease right now?

Q. Today, or any time in the next few days?

A. Well, I couldn't afford to pay what I think it's worth, but I would recommend to one of my clients at least $250,000 * * *."

APPENDIX "D"

"* * * Q. This property, every time you take out a barrel of oil, it's just like any other property, it's worth just that much less, is it not?

A. Yes, that's right.

Q. Isn't that correct?

A. Yes, sir.

Q. Now then, so what would you say, knowing what this property you say produces there—you have a record there and you've given it to the Court—now and you know what the price of oil is, $2.81 a barrel, and considering that, what do you say this property was worth that you could sell it for on the market? Not what you might get twenty years from now—just reasonable market value?

A. That's an extremely difficult question to answer, sir, and in what I say I am going to have to qualify myself in several respects.

Actually, of course, I have been a party to buying and selling reserves or representing my clients in

negotiations for reserves, and I see all types of yardsticks used.

I think probably one of the best is to use what we call the discounted value or the present worth of the property, and take some reasonable fraction of that present worth, taking into account the speculative nature of the oil business.

That of course is not one that is necessarily used. Actually whatever a seller can agree on, that's it; but coming back to your question, if I were asked to give an opinion on the fair market value of the reserves in the middle of 1957, I would be inclined to take the discounted value at 5% interest compounded annually and, first, compute the present worth over a period of approximately twenty years, which in my opinion—then take some fraction of that value.

Now the $779,480 that I computed as being the value of the sale of the oil and gas from these properties would have to be discounted at 5%, which would amount to approximately $483,000, discounted.

Q. Have to knock $483,000 off of that?

A. No, sir, that would be the discounted or present worth, what we call a present worth of the property.

Q. All right, sir. That would be present worth, but how much could you sell it for on the market?

A. SOME FRACTION OF THAT, AND THEN WE GET INTO THINGS THAT ARE PRETTY NEBULOUS AND I CAN ONLY ANSWER THAT IN GENERAL TERMS.

GOOD PRODUCING PROPERTIES THAT HAVE AN ESTABLISHED DECLINE, AND THERE IS LITTLE OR NO SPECULATIVE VALUE, SPECULATION INVOLVED IN IT, COULD—IT'S FRE-

QUENTLY SOLD FOR TWO-THIRDS OF THE DISCOUNTED VALUE OR TWO-THIRDS OF THE PRESENT WORTH, WHICH IN MY OPINION IN THIS PARTICULAR CASE WOULD BE IN THE ORDER OF $324,000.

Q. SO IT WOULD GO DOWN IF YOU WERE GOING TO SELL IT FROM THE $700,000-AND SOME YOU MENTIONED TO $324,000, IS THAT RIGHT, SIR?

A. YES.

Q. WOULD YOU PUT YOUR ANSWER SO THE REPORTER CAN PUT IT IN THE RECORD?

A. YES, SIR, THAT IS CORRECT. * * *" (Emphasis supplied.)

Q. (By Mr. Ogden) I didn't ask you one question, and I would like to ask it. How much will you give for that lease right now, in the shape it's in, as an oil man?

A. How much would I pay for the lease right now?

Q. Today, or any time in the next few days.

A. Well, I couldn't afford to pay what I think it's worth, but I would recommend to one of my clients at least $250,000. * * *"

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 910

A. J. SIMLER,
Petitioner,

vs.

LESLIE L. CONNER AND PHILLIPS PETROLEUM COMPANY a Corporation,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1965

No. 910

A. J. SIMLER,
Petitioner,

vs.

LESLIE L. CONNER AND PHILLIPS PETROLEUM COMPANY a Corporation,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

This is a diversity action filed in 1957 by the Petitioner, A. J. Simler, against the Respondent, Leslie L. Conner. The amount in controversy exceeds the sum of $10,000.00, exclusive of interests and costs. The opinion of the trial court in 1964 is reported at 228 F. Supp. 127. The opinion of the Court of Appeals affirming the trial court is reported in 352 F.2d 138, petition for rehearing denied on November 24, 1965. The opinion of the trial court, 228 F. Supp. 127, is set forth in Appendix A and the judgment of the trial court is set forth in Appendix B. Petitioner, who was plaintiff below, filed his petition in this court on January 14, 1966. No supersedeas bond has been filed.

STATEMENT OF THE CASE

Because Petitioner failed to make a required statement of the facts in this case we will supply same.

This particular case involving the attorney fee due Respondent Leslie L. Conner and other questions has been before this court on two previous occasions. *Simler* v. *Conner,* 368 U.S. 966, 82 S. Ct. 440, 7 L. Ed. 2d 395: reversed for jury trial, 372 U.S. 221, 83 S. Ct. 609, 9 L. Ed. 2d 691. After a jury trial was granted by this court the Petitioner Simler, at the pre-trial conducted by the trial judge, waived a jury trial and agreed to try the case to the court without a jury. In summary, the court found that in 1952 Respondent Conner, an attorney, had a written contingent attorney's fee contract with petitioner A. J. Simler, of Little Rock, Arkansas, to try to recover any interest for Simler in the Estate of Birdine Fletcher, his wealthy deceased sister, who had left her 160 acre oil farm, minerals, producing royalty and all her property to non-heirs and left A. J. Simler, her brother and sole heir at law *"$1.00, this amount and no more"*. A recovery of property of the value in excess of $879,926.00 was made for Simler by his attorney Respondent Conner in 22 court cases over a period of five years, from 1952 to 1957, when Simler took the recovered property and refused to pay Conner his contingent attorney's fee. There were three cases in the County Court; three cases in the District Court and three cases in the Supreme Court of Oklahoma; five cases in the Federal District Court and five cases in the Court of Appeals and three cases in the Supreme Court of the United States (See Findings of Fact, Paragraph 4 of Appendix A).

The trial court found that Conner was entitled to a contingent attorney's fee for the legal services performed in

the amount equal to 36% (thirty-six per cent) of the value of all property, and after allowing credits, entered a judgment for Conner in the amount of $290,975.59. The Petitioner Simler has paid from the funds in court as of this date $50,000.00 on this judgment.

The judgment provides that Respondent Conner receives 36% (thirty-six per cent) of all future oil income from the farm until the balance of the attorney fee is paid and if the income from the farm ceases then the Petitioner Simler is relieved from the payment of any balance due on the fee at that time, Appendix B.

The Petitioner Simler now accuses the trial court of failing to adhere to the pre-trial agreement. This agreement can best be answered by quoting the portion of the pre-trial transcript which contains the pre-trial agreement of the issues to be presented to the court and what would be considered in fixing value of the recovery and the manner in which the court would conduct the trial:

> (R. 205): "The Court: The Court is very concerned about the stipulation that you gentlemen will enter into to waive a jury and try it to the court. The fee contemplated of July 18th, 1952, of a reasonable fee of all that's recovered, that would be, of course, the farm, the surface, the minerals, and what have you? Now then, if Mr. Ogden is talking about money alone, . . . in order for the court to give a reasonable fee, based upon the value of the recovery, whether it be land or minerals or reserve minerals or reserve oil, I'd have to have some kind of a report showing how much the reserves are.
>
> Mr. Ogden: Sure (R. 206).
>
> The Court: Because the cash fee would be based upon the reserves the same as cash that is produced."
>
> (R. 207): "Mr. Ogden: Well if the court please, so you might better understand why I am making

even these statements, my client don't want to give up an inch of his land to anybody, or the minerals. He wants that.

The Court: Well, in my thirty-five years of practicing where I had title questions and took it on a contingent fee, I got part of that minerals, I got part of the surface and I got part of that farm house and the barn and the wells and everything else. Now, then, if you're going to take him out of that, you've got to determine the amount of reserves.

Mr. Ogden: Yes, sir."

It is abundantly clear from the two pre-trial hearings that Mr. Ogden, attorney for Mr. Simler, agreed to the methods and formulas the trial judge stated he was going to use in determining the value of the property recovered and the fee due to Mr. Conner.

The legal question of the pre-trial agreement was presented by Petitioner to the trial court on his motion for a new trial and also the amount of the judgment based on the valuation of the reserves. The same arguments were presented to the Court of Appeals by Appellant's Brief and by oral argument.

Here Petitioner uses the same argument and propositions as he did in the trial court and in the Court of Appeals, but has re-worded his propositions in an attempt to inject a constitutional question of due process of law. This is the first time on this appeal that Petitioner has attempted to raise a constitutional question. There was no attempt by the Petitioner to raise a constitutional question in the trial court or the Court of Appeals.

The Phillips Petroleum Company is the operator of the oil field and is a "stockholder" STAKEHOLDER in the case.

REASONS FOR DENYING THE WRIT

1. The petition for certiorari does not comply with Rule 15(A) and (H) and Rule 19 and Rule 23(B) (iii) and E of the Supreme Court.

2. The petitioner failed to raise the constitutional question of "denial of due process" in either the trial court or in the Court of Appeals.

3. There are no Court of Appeals decisions in conflict on the matter decided in this case, nor are there any federal statutes involved.

4. This case does not involve an important question of federal law which has not been settled by this court nor has the trial court or the Court of Appeals decided a federal question in conflict with decisions of this court.

5. There are no allegations or citations of cases that the findings of fact are clearly erroneous under 52(A) Federal Rules of Civil Procedure.

6. This court will not review a question of fact decided by the trial court without a jury.

ARGUMENT AND BRIEF OF AUTHORITIES

I

The Binding Effect of a Pre-Trial Agreement Upon the Trial Judge Does Not Present a Question of Due Process of Law.

The trial court adhered to the pre-trial agreement shown in the 59 pages of pre-trial transcript. There is no question but that counsel and the petitioner knew that in fixing the value of the 160 acre farm with producing oil

runs, the court would consider the value of the oil and mineral reserves in which the owner Simler would participate for the next 20 years. The Court of Appeals in its opinion 352 F.2d 138 after a careful review of the pre-trial agreement and the judgment specifically held (142):

> "Appellant puts stress upon the pre-trial proceedings and order to support his contention that the judgment, as rendered, violates what the parties had agreed upon. We find no merit to this contention. It is true that the parties agreed that Conner would not be given an interest in the property in payment of any fee due him. The judgment is in keeping with this agreement but it does properly give Conner a lien upon 36 per cent of Simler's interest in the minerals and mineral rights above 6400 feet until the full amount due Conner is paid." * * * "We do not believe that this lien provision violates the pre-trial agreement or order, because it gives Conner no ownership in the land or mineral rights."

Petitioner's first proposition in our opinion does not present to this court any justification for granting a writ of certiorari.

II.

Neither the Trial Court nor the Court of Appeals Disregarded State Law in Fixing the Attorney's Fee.

Petitioner argues that the trial court and Court of Appeals disregarded state law in approving the Respondents' attorney's fee. The trial court found that the value of property recovered for Petitioner by Respondent Conner to be $879,926.00 (Appendix A). When the value of the property of $879,926.00 is compared to the judgment of $290,975.59 it is clear that the attorney's fee does not exceed 50%. Counsel's argument that the fee exceeded the amount

allowed by law is in error. The Petitioner did not raise the question of the state statute in the Court of Appeals, however, if the question had been raised this Court in dealing with issues of state law will accept the determination of Courts of Appeal on questions of state law, and will do so where petitioner seeking certiorari does not contend there was an erroneous interpretation of state law. (*Richards* v. *U. S.*, 82 S. Ct. 585 (U.S. Okla.), 369 U.S. 1, 7 L. Ed. 2d 492).

III.

The Judgment Is Not Based on Speculation, Conjecture and Uncertainty and Does Not Deny the Petitioner Due Process of Law.

The contention by Petitioner that the judgment is based on speculation, conjecture and uncertainty is likewise without foundation. The judgment (Appendix B) specifically sets out the amount to be received by Respondent Conner at $290,973.59.

The judgment is to be paid from 36% of over $150,000 on hand in the clerk's office and 36% of the oil and gas runs from the oil wells until same is satisfied. This particular Fletcher Farm recovered by the Respondent attorney Conner for his client the appellant and petitioner Simler gets .05 interest in the Medrono Unit (4,300 acres) of which the Flethcer Farm is 160 acres. For years this interest has paid more than $3,000.00 per month on this Simler interest alone. Therefore, there is no interest in the land, only interest is in what oil and gas is produced to pay the judgment.

In *F. G. Cooper & Co.* v. *Brice,* 86 F. Supp. 308 (N.Y.), the district court entered a judgment for plaintiff in the amount of $96,000.00 ordered that all royalties be applied by the plaintiff to the payment of the judgment. In that

case the defendant was less fortunate because all of the royalties were applied to payment of the judgment and the judgment was not discharged if the royalties ceased to be paid.

The judgment in favor of Respondent Conner is just, fair and definite in amount.

IV.

The Petition for Writ of Certiorari Does Not State Any Grounds or Authorities Which Warrant a Review by This Court.

Petitioner's claims upon the merits have been fully considered and answered and decided by the trial court, reported in 228 F. Supp. 127, and by the United States Court of Appeals, Tenth Circuit, reported in 352 F.2d 138. There were no constitutional questions or federal statutes presented in the trial or appellate courts in this case. Therefore, this court should not decide questions which were not passed upon by the Court of Appeals. A point not raised before the FPC would not be considered by Supreme Court which had granted Certiorari to review Court of Appeals. *Sunray Mid-Continent Oil Co.* v. *FPC*, 80 S. Ct. 1392. See also *Wisconsin* v. *FPC*, 83 S. Ct. 1266, 373 U.S. 294, 10 L. Ed. 2d 357. On certiorari, Supreme Court would not decide questions not dealt with by Circuit Court of Appeals. *Owens* v. *Union Pacific R. R.*, 63 S. Ct. 1271, 319 U.S. 715, 87 L. Ed. 1683. No substantial federal questions are claimed, cited or involved as required by the Rules of this court and under *McArthur* v. *U. S.*, 62 S. Ct. 915, 315 U.S. 787, 86 L. Ed. 1192, the petition should be denied.

There is no conflict alleged between Court of Appeals decisions. There is no constitutional or federal question presented or involved.

The decision of the trial court was on a question of fact, that is, the amount of a reasonable contingent fee and the Court of Appeals opinion affirming the lower court sets this out. Where trial has been by court without jury, Judge's Findings of Fact should not be set aside unless clearly erroneous. Rule 52(A), Federal Rules of Civil Procedure, 28 U.S.C.A. *Krunholz* v. *Goff*, (315 F.2d 575, 6th 1963). *Bauman* v. *Choctaw, Chickasaw Nations*, (C.A. 10th) 333 F.2d 785, certiorari denied 85 S. Ct. 658, 379 U.S. 965, 13 L. Ed. 2d 559.

Petitioner has presented no acts or law that would be violative of due process even if the question had been properly raised in the lower courts. In closing it should be noted that this attorney increased the Petitioner's inheritance over 800,000 times and he should be paid and this litigation ended.

It is respectfully submitted that Petitioner has presented no grounds for certiorari under due process and that his petition should be denied.

Respectfully submitted,

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Leslie L. Conner

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630-636 Hightower Building
Oklahoma City, Oklahoma
Of Counsel

January, 1966.

APPENDIX A

A. J. SIMLER, Plaintiff,

v.

Leslie L. CONNER, Defendant.

Phillips Petroleum Company, a Corporation,
Additional Defendant.

No. 8008.

United States District Court
W. D. Oklahoma.

April 1, 1964.

Client brought diversity action against attorney and another to fix a reasonable contingent attorney's fee for attorney under contingent fee arrangement. The District Court, Bohanon, J., held that evidence established that reasonable contingent attorney's fee for extensive legal services rendered by attorney in successfully contesting will was 50% of total recovery by client less 14% offset.

Judgment in accordance with opinion.

1. Courts, Key 308

Where resident of Arkansas brought diversity action in federal District Court in Oklahoma against individual, who was resident of Oklahoma, and corporation, which had its principal place of business in Oklahoma, and which had no interest in controversy except as stakeholder, and amount in controversy, exclusive of interest and costs, exceeded sum of $10,000, District Court had jurisdiction of parties and subject matter of action.

2. Attorney and Client, Key 148(3)

Evidence established that reasonable contingent attorney's fee for extensive legal services rendered by attorney in successfully contesting will was 50% of total recovery less 14% offset. 5 Okl.St.Ann. § 7; Canons of Professional Ethics, canon 12, c. 1, 5 O.S.A.Appendix.

3. Attorney and Client, Key 147

Contract, by which client employed attorney to contest will, and which provided for reasonable contingent fee to be fixed by court, was valid and enforceable in Oklahoma. 5 Okl.St.Ann. § 7; Canons of Professional Ethics, canon 12, c. 1, 5 O.S.A.Appendix.

4. Attorney and Client, Key 151

Where client and his attorney entered into contract, by which client employed attorney to contest will, and which provided for reasonable contingent fee to be fixed by court, and attorney, with knowledge and consent of client, employed second attorney to assist him for 28% of fee, written assignment by second attorney of 28% fee to client for $12,000 was valid, and client was entitled to deduction of 28% of fee awarded to first attorney.

5. Attorney and Client, Key 175, 182(4)

Where evidence established that reasonable contingent attorney's fee for extensive legal services rendered in successfully contesting will was 50% of total recovery less 14% offset, attorney was entitled to lien on 36% of minerals and mineral rights awarded to client until attorney was paid 36% of total recovery by client or there was no further production of oil and gas.

6. Federal Civil Procedure, Key 2737

Where evidence established that reasonable contingent attorney's fee for extensive legal services rendered by attorney in successfully contesting will was 50% of total recovery less 14% offset, costs would be assessed against client to extent of 64% and against attorney to extent of 36%.

7. Attorney and Client, Key 140

In determining reasonableness of attorney's fee, many varied and complicated facts must be considered, and there is no fixed standard or guide by which triers of fact can be materially assisted, and entire picture must be considered to arrive at just conclusion, fair to all parties. 5 Okl.St.Ann. § 7; Canons of Professional Ethics, canon 12, c. 1, 5 O.S.A.Appendix.

John B. Ogden, Oklahoma City, Okl., for plaintiff.

Paul C. Duncan, Oklahoma City, Okl., for defendant Conner.

Cecil C. Hamilton, Oklahoma City, Okl., for defendant Phillips Petroleum Co.

BOHANON, District Judge.

[1] The plaintiff, A. J. Simler, was at all times mentioned herein a citizen and resident of the State of Arkansas. The defendant Leslie L. Conner was at all times mentioned herein a citizen and resident of the State of Oklahoma. The defendant Phillips Petroleum Company, a corporation, has its principal place of business in the State of Oklahoma. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000, and therefore the Court has jurisdiction of the parties and the sub-

ject matter of this action. The defendant Phillips Petroleum Company has no interest in this matter except as a stakeholder, and it will not be necessary to further refer to this company except in that capacity.

The parties to this litigation at pretrial hearing stipulated to waive a jury trial and agreed to try the case to the Court.

This case involves the fixing of a reasonable attorney's fee for the defendant Conner under a contingent fee arrangement with the plaintiff Simler.

The case was tried to the Court on February 10 and 11, 1964, and the Court, having heard and duly considered all of the pleadings, depositions, evidence, and exhibits, finds the essential facts as follows:

Findings of Fact

1. Birdine Fletcher owned the Northwest Quarter of Section 34, Township 6 North, Range 10 West, Caddo County, Oklahoma, together with other property. She made a Will dated July 9, 1952, in which she devised to A. J. Simler, her brother and only heir, "the sum of $1.00, this amount and no more." And the remainder of her estate to others, and the particular land in question to Mt. Alverno Convent and St. Joseph's Hospital, both of Maryville, Missouri, and St. Anthony Hospital of Oklahoma City, in equal shares. Mrs. Fletcher died testate in Oklahoma City on July 13, 1952, and her Will was filed for probate in Oklahoma County on July 14, 1952.

2. The plaintiff Simler, on July 18, 1952, employed the defendant Conner, a licensed and practicing attorney, by written contract, to represent him, in contesting the Will of his sister and to recover on his behalf all or part of the assets of the estate of his sister. This contract pro-

vided for a reasonable contingent fee to be fixed by the Court. In compliance with this contract Conner performed valuable services for and on behalf of Simler, which were successfully completed by defendant in May, 1957, resulting in the recovery for the plaintiff of accumulated oil and gas runs, and the above described 160 acres of land with the sixteen producing oil wells thereon, subject to an oil and gas lease in favor of the defendant Phillips Petroleum Company and assigns.

3. The defendant Conner, with the knowledge and consent of Simler, employed other attorneys to assist him in the litigation for the recovery of the above described property. Conner employed Mr. James E. Grigsby and Mr. Phil Daugherty, both licensed practicing attorneys in Oklahoma City, who were to be paid for their services a part of the proceeds, if any, from Conner's contingent fee contract, when such services had been completed. On September 25, 1952, plaintiff and defendant agreed in writing that a "reasonable contingent attorney's fee" as provided in the contract of July 18, 1952, would be a graduated fee of 25 per cent if the case was settled, 33⅓ per cent if tried, and 50 per cent if it was necessary to appeal, or defend an appeal in the Supreme Court, and it was under the terms of this letter that Conner employed Mr. Daugherty and Mr. Grigsby. At pretrial conference it was stipulated by the parties and their attorneys that defendant would not rely on the contract of September 25, 1952, but that the contingent attorney's fee should be fixed by the Court, without a jury, to be paid in money only, and that Conner and his associates relinquished their rights to any interest in the real estate above described and the oil and gas production therefrom, except as hereinafter stated.

4. The defendant Conner investigated the facts of the case, and made an extensive research of the law, and per-

formed an enormous amount of trial services for the plaintiff Simler. The legal services rendered by the defendant Conner covered a period from July 18, 1952 through May, 1957, and during this time there was continuous investigation, legal research, trial of cases, preparing appeals, and defending appeals in the Supreme Court of the State of Oklahoma, the Court of Appeals, Tenth Circuit, and the United States Supreme Court, which, of course, necessitated a great deal of work in the matter of legal research, preparing briefs, and making oral arguments before these Courts. The defendant Conner contested the Will of Simler's sister, Birdine Fletcher, in the County Court of Oklahoma County in Case No. 31726, and this case was twice appealed to the District Court of Oklahoma County, and these cases then appealed to the Supreme Court of the State of Oklahoma, and there became cases No. 36075, In re Fletcher's Estate, 269 P.2d 349, and No. 37365, 308 P.2d 304. Four separate cases were filed in the United States District Court for the Western District of Oklahoma by the defendant for the plaintiff. There were three appeals to the Court of Appeals, Tenth Circuit, from these cases. Also there were three appeals to the Supreme Court of the United States from the Court of Appeals, Tenth Circuit, being cases No. 677 (1954), Wilson v. Simler, 347 U.S. 954, 74 S.Ct. 681, 98 L.Ed. 1099; No. 510 (1955), 348 U.S. 929, 75 S.Ct. 342, 99 L.Ed. 728; and No. 409 (1955), 350 U.S. 892, 76 S.Ct. 153, 100 L.Ed. 785. Also there was one original action filed by the plaintiff in the Court of Appeals, Tenth Circuit, No. 5201 (not reported). Conner successfully defended an original action in the Supreme Court of the State of Oklahoma, filed against the plaintiff by the Executor of the Estate of his deceased sister, and the Sisters of St. Francis, the residual beneficiary of the Will. This suit was an attempt to defeat Federal Court litigation. And the defendant Conner successfully de-

fended another action filed in the District Court of Oklahoma County against plaintiff and his attorneys.

5. Attorney Grigsby was employed by Conner on the basis of 28 per cent of Conner's fee. Mr. Grigsby filed suit against plaintiff; Conner could not represent Simler and he employed John B. Ogden and paid him a fee of $7,500, and here claims credit for this $7,500 expense. Mr. Grigsby disassociated himself with the litigation before it was completed and assigned to Simler this 28 per cent in Conner's contingent fee, for which he received a note of $12,000, secured by a mortgage on the above-described land. This note was paid and the mortgage released.

6. From July 18, 1952, to the last of May, 1957, the income from the described farm was paid to W. H. Wilson, Executor of the Estate of Birdine Fletcher, deceased. As a result of the legal services performed by Conner, Simler has been paid in cash by the Executor of the Fletcher Estate the sum of $88,446.62; from June 1, 1957, to February 11, 1964, the defendant Phillips Petroleum Company, from oil and gas sales, has paid into the Clerk's office the sum of $238,431, pursuant to an order of this Court. From this sum, by Court order, Simler was paid $47,163.50, making a total sum received by Simler of $135,610.12. There remains in the office of the Clerk of this Court the sum of $191,267.50.

7. The Court finds that as of the first day of June, 1957, the proved primary and secondary oil, gas and mineral reserves, and undeveloped oil and gas reserves, above the 6400 foot level, that is, 6400 feet from the surface of the land, to the interest therein recovered by Conner for Simler, had a total value as of that date and future realization to Simler of $779,480.

The Court finds that the value of the surface rights of the farm as of the date of the completion of Conner's services was $12,000.

8. By stipulation of the parties, it was agreed that plaintiff Simler advanced and paid out as litigation expenses and costs the sum of $5,000, for which he is entitled to reimbursement out of the funds on deposit with the Clerk of this Court.

9. The defendant Conner has been paid by the plaintiff Simler the sum of $24,000.

[2] 10. The Court finds that a reasonable contingent attorney's fee for all the services rendered to the plaintiff Simler by the defendant Conner as hereinabove enumerated is 50 per cent of the June, 1957, value of the total recovery, which includes property, cash, and oil and gas mineral interests. From this fee percentage, the Court finds that Simler is entitled to offset against the same 28 per cent of said 50 per cent (or a total of 14 per cent offset) and that Simler is entitled to 64 per cent of all the recovered property, money, and oil and gas interests, plus $5,000, as above found, for litigation expenses and costs, and that Conner should receive and recover 36 per cent of the cash value of all the recovered property; that the respective percentages of the cash on hand, and accruing, be paid to the respective parties as above outlined, and that the defendant Conner should have a lien on the property for the unpaid balance of his fee, to the extent of 36 per cent of the income from the oil, gas and other production from the above-described farm, and that Simler is entitled to the remaining 64 per cent.

11. The Court finds that Conner and his associates should be denied any permanent interest in the surface of the above-described land or any interest in the rents and

profits during past years or future years (other than above stated).

12. At the close of all the evidence in this case, the Court made an oral declaration of his findings and judgment which was not intended to be all-inclusive, and made no finding as to an item of expense of $7,500 incurred by Mr. Simler for attorneys' fees to represent him in the case filed by Mr. James E. Grigsby. Upon full consideration of this phase of the case, the Court now finds that the defendant Conner should not be charged with any part of this expenditure. The Circuit Court opinion decreed the Fletcher farm to be the property of Simler and held that the charitable foreign corporations, Mt. Alverno Convent and St. Joseph's Hospital, of Maryville, Missouri, and St. Anthony Hospital, of Oklahoma City, under the Constitution of the State of Oklahoma could not have and receive title to the Fletcher farm. Thereafter certain distributions were made to Simler. Attorney Grigsby, who had been employed by Conner on the basis of 28 per cent of the Conner fee, made demand for his portion of that distribution. Mr. Simler declined distribution; the reasons here are not important. Grigsby filed suit for his portion of the fee based upon his contract with Mr. Conner. Mr. Conner declined to represent Mr. Simler in the litigation because of the relationship between Conner and Grigsby, and it resulted in Mr. Simler employing Mr. John Ogden as his attorney in that matter. This suit resulted in Mr. Simler paying to Mr. Grigsby the sum of $12,000 for an assignment of the 28 per cent of the Conner fee, otherwise Grigsby's interest in the Conner fee contract. Mr. Simler paid Mr. Ogden the sum of $7,500 attorney's fee in the Grisby-Simler lawsuit, and Simler here is claiming a refund of this amount.

In allowing Mr. Simler credit for the full 28 per cent of Mr. Grigsby's interest in Mr. Conner's fee, the Court finds that basically the attorney's fee allowed in this case is slightly more than 36 per cent.

In making the fee allowance, the Court denies Conner and his associates any interest in the oil and gas or other mineral reserves in the following known producing horizons:

(a) The Gilcrease Sand above the Hunton Lime.
(b) Hunton Lime Formation.
(c) Simpson Formation.
(d) Upper and lower Dolomite.
(e) Wilcox Sand Formation.
(f) McLish Sand Formation.
(g) Oil Creek Sand Formation.

Except as these formations may be obligated to pay the judgment lien in favor of Conner.

The experts who testified at the hearing in this case stated it was their opinion that the above-named formations did underlie this land below the 6400 foot level, and the right to explore these formations and produce the oil and gas therefrom had considerable value, although no specific value could be placed thereon. Conner and his associates are denied any interest in these valuable rights.

Conclusions of Law

[3] 1. Defendant Leslie L. Conner's contract dated July 18, 1952, is a contingent fee contract dependent upon recovery and is valid and enforceable in Oklahoma. That attorney's contingent fee contract not to exceed 50 per cent of the recovery is provided for and allowed by the Statutes

of the State of Oklahoma, Title 5 O.S.A., Section 7, which statute was in force and effect on July 18, 1952.

2. That as a result of all the legal services performed for A. J. Simler by the defendant, Leslie L. Conner, the plaintiff, A. J. Simler, contrary to the terms of his sister's Will, and as a result of the contest thereof, became the owner of the real property and all the oil, gas and minerals therein subject to existing oil and gas leases, described as:

> Northwest Quarter (NW/4) of Section Thirty-four (34), Township 6 North, Range 10 West of the I.M.,
>
> in Caddo County, Oklahoma,

and all accumulations, monies, runs, and things incident thereto, all of which he has accepted.

[4] 3. That the written assignment by James E. Grigsby to A. J. Simler of the 28 per cent contingent fee contract of any contingent fee awarded Leslie L. Conner is valid. That the plaintiff, A. J. Simler, is entitled to 28 per cent of any attorney's fee hereinafter awarded to the defendant, Leslie L. Conner, which 28 per cent shall be deducted and retained by A. J. Simler from the fees of Leslie L. Conner.

4. That plaintiff, A. J. Simler, is to be paid the sum of $5,000 as the stipulated amount of his expenses and to reimburse him therefor.

5. The Court concludes that there has been paid from the estate of Birdine Fletcher to A. J. Simler the sum of $88,446.62, and by Phillips Petroleum Company, a corporation, the sum of $238,431 into the registry of this Court, being a total amount of $326,877.62, less $5,000 expense money to be paid A. J. Simler, leaving a balance of $321,877.62. That the defendant, Leslie L. Conner, is en-

titled to 50 per cent of $321,877.62, which is $160,938.81, less $45,062.86, which is 28 per cent thereof, leaving a total sum of $115,875.95 due Leslie L. Conner from the cash on hand. That plaintiff, A. J. Simler, is entitled to credit of $24,000 from this amount, leaving a net balance to be paid by the Clerk of this Court to defendant, Leslie L. Conner of $91,875.95. That the value of the surface of the property as of May, 1957, was $12,000. That Leslie L. Conner is entitled to be paid immediately by the Clerk of this Court an additional $4,320, which is 50 per cent of $12,000 surface value, less the 28 per cent Grigsby interest of A. J. Simler. That any other funds held by any other persons, firms, or corporations, or hereafter paid into this Court, attributable to this described Fletcher Farm are to be distributed by the Clerk of this Court 64 per cent to A. J. Simler and 36 per cent to Leslie L. Conner.

[5] 6. That in addition thereto, the defendant, Leslie L. Conner, is entitled to 50 per cent of $541,049, being the remaining value of the oil, gas, minerals interest in the above described farm as of the first day of June, 1957, which was $779,480, less the production and cash paid therefrom to the Clerk's office from June, 1957, to February 11, 1964, of $238,431. That the plaintiff, A. J. Simler, is entitled to set off from the 50 per cent of $541,049 (which is $270,524.50) an amount equal to 28 per cent thereof, which is $75,746.86, leaving a net amount to be paid to defendant, Leslie L. Conner, from the future oil, gas, mineral and produced reserves of said property, of $194,777.64. That out of the income from the production from the Northwest Quarter of Section 34, Township 6 North, Range 10 West, Caddo County, and any and all units of which it is a part or entitled to participate, there will be paid in monthly payments by defendant Phillips Petroleum Company, a corporation, and assigns, and any other companies producing from said property beginning after February 11,

1964, the following proportions, to-wit: 36 per cent thereof to Leslie L. Conner, and 64 per cent thereof to A. J Simler, until the amount of $194,777.64 has been paid in full by them to Leslie L. Conner or his assigns, and then all of said remaining interest and payments reverts to A. J. Simler, and Leslie L. Conner is granted a lien on 36 per cent of the Simler minerals and mineral rights until this payment is paid or there is no further production.

7. That defendant, Leslie L. Conner, shall have the right, power, and authority to sign any instruments, assignments, leases, division orders, and such other instruments as affecting this oil payment on this described farm as he may deem necessary to effectuate this judgment, or to pool, unitize, waterflood for primary or secondary recovery for any orderly development thereof.

[6] 8. That the costs of this case are assessed against A. J. Simler to the extent of 64 per cent, and to Leslie L. Conner to the extent of 36 per cent.

9. The Court directs the entry of a judgment in favor of the defendant, Leslie L. Conner, and against plaintiff, A. J. Simler, in conformity with these findings of fact and conclusions of law.

[7] In making a determination of the reasonableness of an attorney's fee, many varied and complicated facts must be taken into consideration. There is no fixed standard or guide by which the triers of the fact can be materially assisted, but the entire picture must be considered to arrive at a just conclusion, fair to all parties.

The Canons of Professional Ethics adopted in Oklahoma, Title 5, Chapter 1, Appendix 3, Oklahoma Statutes 1961, in pertinent part provide:

> "In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty

and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

"In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

In 7 C.J.S. Attorney and Client § 191, pages 1080, 1081, it is stated:

"The reasonableness of the fee charged or allowed must be determined like any other fact in issue in a judicial proceeding, and in making such determination all the facts and circumstances of the particular case, including so far as applicable those enumerated herein below, must be taken into consideration.

"In determining what is a reasonable attorney's fee or allowance for legal services rendered, many and varied

elements or factors are to be considered. Among the principal elements or factors to be considered are the amount and character of the services rendered, the nature, and importance of the litigation or business in which the services were rendered, the degree of responsibility imposed on, or incurred by, the attorney, the amount of money or the value of the property affected by the controversy, or involved in the employment, the degree of professional ability, skill, and experience called for and exercised in the performance of the services, and the professional character, qualifications, and standing of the attorney, and also the amount recovered."

The general statements above quoted are helpful and, of course, should be considered, and the respective elements or facts to be considered must be viewed in light of the relative importance in the particular litigation for which an attorney's fee is sought and determined. The general rules, supra, have been considered and adopted by the Supreme Court of Oklahoma. See Miller, et al v Burkett, 191 Okl. 521, 130 P.2d 996; Driver, Plaintiff-in-Error, v. Tolstornog, et al., (Okl.) 358 P.2d 1108.

The Tenth Circuit, in United States v. Anglin & Stevenson, et al., 145 F.2d 622, had under consideration the allowance of attorneys' fees awarded by the United States District Court for the Eastern District of Oklahoma, and at page 630, Judge Murrah aptly stated:

"The allowance of 25% of the amount recovered is well within the proof adduced on this record in support of a reasonable attorney's fee, and it is well settled that in cases of this kind the allowance of attorneys' fees is within the judicial discretion of the trial Judge, who has close and intimate knowledge of the efforts expended and the value of the services rendered. And an appellate Court is not warranted in overturning

the trial Court's judgment unless under all of the facts and circumstances it is clearly wrong."

City of Wewoka v. Banker, 10 Cir., 117 F.2d 839.

Based upon a full consideration of all the facts, circumstances, and conditions surrounding the litigation out of which this case arises, and having heard and observed the witnesses on the witness stand, the Court feels that the amount of attorney's fee fixed by the Court is just, fair and reasonable.

APPENDIX B

"Judgment

"Based upon the Findings of Fact and Conclusions of Law contained in the Court's Opinion filed in this cause, the Court enters the following judgments:

"It Is Therefore Ordered, Adjudged and Decreed by this Court:

"1. That from the monies on hand in the Registry of this Court the Clerk pay to A. J. Simler the sum of $5,000 to reimburse him for past litigation expenses incurred by him.

"2. The defendant Leslie L. Conner is granted a judgment against A. J. Simler in the sum of $290,973.59 for his contingent attorney's fee, as an economic interest in and payable from the oil and gas runs from the property hereinafter described, including cash on hand in the Registry of this Court as of the date of this judgment.

"3. That the Clerk of this Court pay from the Registry of this Court from the funds on hand, less the sum of $5,000 set forth in paragraph '1.' above, 64 per cent of

said fund to A. J. Simler, and 36 per cent of said fund to Leslie L. Conner.

"4. All costs accrued shall be deducted from the respective parties' interest on the basis of 64 per cent to be charged against A. J. Simler, and 36 per cent against Leslie L. Conner. All future costs, if any, shall be charged against the parties on the same percentage basis.

"5. All sums paid to Leslie L. Conner shall be credited to A. J. Simler against the total Judgment herein rendered.

"6. Any portion of the Judgment in favor of Leslie L. Conner which remains unpaid shall be paid by Phillips Petroleum Company, a corporation, or any other crude oil or gas purchaser, their successors or assigns, from the production attributable to the A. J. Simler interest, from proceeds of the sale of oil, gas, or other minerals, or from bonuses, leases, or production interests from the land described as the Northwest Quarter (NW 1/4) of Section 34, Township 6 North, Range 10 West, Caddo County, Oklahoma, known as the Fletcher Farm in the West Cement Medrano Unit and Noble Olsen Unit, which is to be paid direct to Leslie L. Conner by Phillips Petroleum Company, a corporation, or any other crude oil and gas purchaser or purchasers, or any firm, or corporation, producing, taking or using any oil, gas, mineral rights or interests from said land, or which said land is entitled to receive by any type of agreement, unitization or otherwise.

"7. This Judgment in favor of Leslie L. Conner shall not draw interest except if payments are withheld to Leslie L. Conner by reason of any actions taken by or on behalf of A. J. Simler, then interest on said unpaid payments shall bear interest at the rate of 6 per cent per annum until paid."

"8. That 36 per cent of the proceeds from the sale of future oil, gas, leases, or other mineral interests in and under, or attributable to the described land, is hereby transferred, conveyed and assigned to the defendant Leslie L. Conner until the full amount of this Judgment is paid; provided, however, if said land ceases to produce oil or gas or other minerals in commercial quantities, and by any method of recovery, then the plaintiff A. J. Simler is relieved from the payment of the unpaid balance.

"9. That the plaintiff, A. J. Simler, is hereby directed to execute and deliver all assignments, division orders and such other instruments as may be necessary to effectuate this Judgment in full and as herein directed to the end that the defendant shall receive his money and his part of the monthly oil runs and checks. If the plaintiff, A. J. Simler, does not execute and deliver the above assignments, Division Orders and such other instruments within five (5) days from the filing of this Judgment, then this Judgment shall constitute such assignments, division orders and other instruments the same as though the same has been executed and delivered by A. J. Simler to the oil companies producing oil and/or gas from the land described herein. That the defendant, Leslie L. Conner, shall have the right, power, and authority to enter into any agreements affecting his oil runs of his interests in the minerals, or to pool, unitize, waterflood, or sign for primary or secondary recovery, in order that the minerals be produced, sold and the pool may be orderly developed and waterfloods put into effect, and to that end the Court retains jurisdiction over the property, subject matter and parties until the remaining Judgment is paid in full. That defendant, Leslie L. Conner, is granted a lien on the property until the complete payment of this Judgment.

"10. That the Court retain jurisdiction of this case and Judgment for all purposes until the same is paid in full.

"Dated this 1st day of April, 1964.

"Luther Bohanon
"United States District Judge

"Judgment Entered in Civil Docket on April 1, 1964.
"Filed April 1, 1964."

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 910

A. J. SIMLER,
Petitioner,

VERSUS

LESLIE L. CONNER and PHILLIPS PETROLEUM COMPANY, a corporation,
Respondents.

PETITION FOR REHEARING

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March, 1966

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-6750

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In the
Supreme Court of the United States

OCTOBER TERM, 1965

No. 910

A. J. SIMLER,
Petitioner,

VERSUS

LESLIE L. CONNER and PHILLIPS PETROLEUM COMPANY, a corporation,
Respondents.

PETITION FOR REHEARING

This petitioner respectfully requests this Court to reconsider its Order entered herein on the 28th day of February 1966, denying the Petition for Writ of Certiorari in the above captioned case; and for reasons and grounds for this petition shows to this Honorable Court, as follows:

STATEMENT OF FACTS

This is a suit between A. J. Simler, formerly a client of Leslie L. Conner, seeking a declaratory judgment for the purpose of determining what is a reasonable attorney's fee. The petitioner paid the respondent, Leslie L. Conner, $74,000.00 in cash. This controversy has heretofore been before this Court. See *Simler* v. *Conner,* 83 S.Ct. 609, 372 U.S. 221, 9 L.Ed.2d 691.

I.

The petitioner waived a jury trial relying upon the pre-trial agreement. The trial court, we think, failed to follow the requirements of the pre-trial agreement and proceedings and fixed an attorney's fee in the amount of $290,975.59. This attorney's fee is payable out of 36 per cent of the oil production from the property involved. The pre-trial agreement provided as heretofore pointed out in the Petition for Writ of Certiorari herein, that the court would fix a reasonable attorney's fee, in money, and said agreement must be construed to mean money to be paid upon the rendition of the judgment. The case as cited in the Petition for Writ of Certiorari herein, we think, holds that if this pre-trial agreement and order is not sufficiently definite for a trial, then it should be vacated. See *Plastino* v. *Mills,* 236 F.2d, page 32.

The pre-trial order crystallizing the issues of law and fact is binding upon the parties and upon the court. See *Montgomery Ward and Company* v. *Northern Pacific Terminal Company,* 128 F.Supp. 520, in which the Court said:

> "* * * It is objected that the Federal Rules of Civil Procedure, 28 U.S.C.A., do not require the statement of a cause of action, and therefore plaintiff is not bound by his theory of the case. If this position is sound, court proceedings are reduced to irrationality. In any event, this Court directed that a pre-trial conference be held here to 'simplify the issues.' The definitive order, heretofore entered, crystalized the contentions of law and fact, and the simplified issues were based thereon. The pre-trial order was adopted to prevent appellate courts from writing essays about theories of

law and circumstances of fact not involved in the case. The order is not only binding on the higher courts, but is also binding upon this Court and the parties, and specfically upon plaintiff. * * *"

In *Clark* v. *United States,* D.C., 13 F.R.D. 342, 345, the Court said:

> "When a plaintiff has by his counsel advised the Court and defendant of the theories upon which he relies and has given account of these, then the Court should not adopt some other theory of recovery, even if it should be believed that such a theory was more applicable."

The petitioner feels that this Court should so decide in this case and fix the binding effect of a pre-trial order upon the Judge, and petitioner feels that beyond a question of a doubt, his constitutional rights have been violated in that he has been denied due process of law.

II.

Petitioner respectfully requests the Court to review the testimony offered by MR. EDINGER, a witness offered by the Respondent, Mr. Leslie L. Conner. The witness Edinger stated that he thought the property might or may produce in the next twenty some odd years, oil of the value of $779,480.00. Apparently the Trial Judge took 36 per cent of this amount and fixed that as the attorney fee. The same witness testified that this property on the market was not worth in excess of $250,000.00. If the court had used the 36 per cent of $250,000.00 instead of 36 per cent of $779,480.00, the judgment would have at least been par-

tially based upon competent evidence; so the judgment is based on conjecture, uncertainty, and incompetent evidence and an opinion as to what this property will produce in the next twenty or thirty years; and the property is now burdened with a lien for $290,975.59, which is $40,973.59 more than the property can be sold for on the market today. The judgment is absolutely void for uncertainty. If the property quits producing tomorrow, the judgment would end at that time. If it produces at the same rate as it now produces and oil remains at the same price as the present market, it would take more than twenty years before the petitioner can rid himself of this judgment. This is a denial of due process of law and we call the Court's attention to C.J.S. Volume 49, page 159, Article 76.

In addition to the injustice of fixing the percentage on a speculative amount, the judgment burdens the property until the judgment is paid in full or the property ceases to produce. If the property declines in production one-half, then the judgment will remain for forty some odd years. If the property declines in production three-fourths, or only produces one-fourth of what it now produces, then the judgment will remain on this property for probably eighty years.

The judgment is absolutely void because it is based on speculation, guess and incompetent evidence.

If the property declines in production to the extent so that the respondent would receive $100.00 per month on the judgment or $1,200.00 a year, then it would take 241 years to pay the judgment. We mention this fact to demon-

strate that the judgment is void for uncertainty and is unknown to judicial proceedings. Judgments are defined in law and must be certain and based upon evidence and not speculation or guess. Under the same reasoning as applied to this judgment, a witness could guess or speculate that a cow in her lifetime would produce twenty calves and, therefore, the value of the cow would be equal to twenty-one heads of cattle; or a farm would produce in the next twenty years so many bushels of wheat per year, and in fixing the value of the farm under the reasoning of this case, it should not be fixed on the basis of what the farm would produce in the next twenty years and for what the wheat would sell for, but should be based upon the present market value of the farm. This case presents the same exact logic and reasoning. It is based upon uncertainty, speculation and guess both as to what the farm will produce in oil in the next twenty odd years and the market price of oil during such period.

WE, THEREFORE, most respectfully request this Court to reconsider its Order denying Writ of Certiorari and to rehear this case.

Most respectfully submitted,

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March, 1966

CERTIFICATE OF COUNSEL

The foregoing Petition for Rehearing is filed in good faith and not for the purpose of delay.

JOHN B. OGDEN